IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1043 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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VISHNUBHAI KASIRAM PATEL

Versus

DISTRICT MAGISTRATE

Appearance:

1. Special Civil Application No. 1043 of 2001

Mr. P.S. Gondalia for MR YOGESH S LAKHANI for Petitioner No. 1

Mr. H.L. Jani, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 24/07/2001

ORAL JUDGEMENT

#. Heard Mr.P.S.Gondaliya, learned advocate for Mr.Y.S.Lakhani, on behalf of the petitioner and Mr.H.L.Jani, learned AGP appearing on behalf of the respondents.

#. In the present petition, the order of detention dated 25th August 2001 which has been actually effected on 3rd January, has been challenged by the petitioner under Article 226 of the Constitution of India. The order of detention has been passed by the District Magistrate, Banaskantha against the petitioner under Section 3[1] of the PASA Act. The grounds of detention are communicated to the petitioner under Section 9[1] of the PASA Act. The petitioner has been detained in Surat Jail as Class-II detenu. The petitioner has been considered as the Bootlegger under Section 2[b] of the PASA Act. The detaining authority has claimed privilege under Section 9[2] of the PASA Act. According to the grounds of detention, two offences are registered against the present petitioner dated 27th May, 2000. No unregistered offence has been noted by the detaining authority as per the statements of the secret witnesses. The first statement of the secret witness has been recorded on 14th July, 2000 by the Police Inspector and said statement has been verified by the DySP on 30th July, 2000. Similarly, the second statement and third statement are recorded by the concerned Police Inspector on 14th July, 2000 and 25th July, 2000 and the same are verified by the DY.SP on 30th July, 2000. But the statements of the secret witnesses are not verified by the detaining authority and a specific contention has been raised by the petitioner in ground [f] of the petition. The respondents have filed reply which is taken on record.

#. Mr.Gondaliya, learned advocate has raised various contentions challenging the detention order but according to his submissions, two contentions are enough to vitiate the order of detention. Therefore, he submitted that the statements of the secret witnesses are not verified by the detaining authority and despite of this fact, the detaining authority has claimed privilege under Section 9[2] of the PASA Act and not disclosed the names and addresses of the secret witnesses which ultimately adversely affected the right of the petitioner of making effective representation under Article 22[5] of the Constitution. He submitted that this contention has been specifically raised by the petitioner in ground [f]. The second contention has been by learned advocate Mr.Gondaliya that in the grounds of detention, the detaining authority has come to the conclusion that the provisions of Bombay Police Act under Section 56 and 57 are not applicable to the present petitioner. Therefore, Mr.Gondaliya has submitted that this is nothing but clear non application of mind on the part of the detaining

authority because the detaining authority could have considered the lesser drastic remedy for initiating externment proceedings under Section 56 and 57 of the B.P. Act and since no such remedy is availed by the detaining authority, according to the petitioner, there is clear non application of mind and therefore also the detention order requires to be quashed and set aside by this Court.

#. Learned AGP Mr.H.L.Jani, appearing on behalf of the respondents has submitted that the contention which has been raised in ground [f] by the petitioner has been replied by the detaining authority in para-10 of the reply and so far the contention raised by the petitioner in ground [i] has also been dealt with and replied in paragraph 12 of the reply filed by the authority. Therefore, according to the submission of learned AGP, looking to the reply filed by the detaining authority, the detaining authority has rightly passed the impugned order of detention after considering all the relevant material on record. Learned AGP Mr. Jani has also submitted that the proceedings under Section 56 are time consuming process and therefore there were compelling circumstances as considered by the detaining authority and in that case, there was no other recourse to avail remedy under Section 56 of the Act and since there was no option, the detaining authority has rightly passed the detention order and accordingly the detaining authority has also observed in the grounds of detention that provisions of Section 56 and 57 of the B.P.Act are not applicable to the case of the present petitioner. Therefore, there is no illegality and no non application of mind on the part of the detaining authority. However, Mr.Jani, learned AGP has submitted that no doubt the statements of the secret witnesses have not been verified by the detaining authority and therefore claiming of privilege under Section 9[2] is established the subjective satisfaction on the basis of the record and therefore he also submitted that since the statements of the secret witnesses have been verified by the DY.SP only and the detaining authority has rightly passed the detaining authority and accordingly claimed privilege under Section 9[2] of the PASA Act. However, he supported the detention order and submitted that the order of detention is legal and valid which does not warrant any interference by this Court.

#. I have considered the submission of both learned advocates and looking to the undisputed facts between the parties which are on record that the statement of secret witnesses are not verified by the detaining authority and

despite of this fact, claimed privilege under Section 9[2] of the PASA Act. However, it is noted that while claiming the privilege under Section 9[2] of the Act, the detaining authority has to take extra care because non supplying the names and addressees of the secret witnesses, ultimately adversely affect the rights of the detenu for making an effective representation against the detention. Therefore, without verification of the statements of the secret witnesses, subjective satisfaction cannot be established on record and considering the view taken by the division bench of this Court in para-6 of the decision reported in 1993 [2] GLR p.1659, which runs as under :-

"6. His second contention is that the detaining authority has wrongly exercised the powers under Section 9[2] of PASA Act and by such wrong exercise of powers the detenu, right to make a representation under Article 22[5] of the Constitution has been infringed. He further elaborates his submission by pointing out that the statements of the witnesses have been recorded on 16th October, 1992 and that the said statements have been verified by the Superintendent of Police, C-Division, Baroda city on 16th October, 1992. It has been pointed out by the learned AGP Mr.Y.M.Thakkar that the proposal in the case was made on 16th October, 1992 and the order of detention was passed on 17th October, 1992. It is rather curious that the entire bunch of material was supplied by the sponsoring authority at the time of making the proposal and that has been promptly accepted by the detaining authority and passed the order on the next day itself. At the time of exercising the privilege under Section 9[2] of PASA, a balance is required to be struck between the public interest on the hand and the right of the detenu to make a representation under Article 22[5] of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and / or whether their statements are bogus statements or not ? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to

> verify the position and make an effective representation on that basis. As against this, there is a provision under Section 9[2] carved out on the basis on Article 22[5] of the Constitution which provides that nothing in sub-sec [1] shall require the authority making such order to disclose facts which it considers to be against the public interest to disclose. Therefore, it is the duty of the detaining authority to strike a balance as stated above, that in the public interest, the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do some exercise before actually exercising the privilege under Section 9[2] of PASA. Looking to the facts and circumstances of the case, it is clear, as stated hereinbefore, that the verified statements were also placed before the detaining authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under Section 9[2], as the proposal was made on 16th October, 1992 and the order of detention was passed on the following day, i.e. 17th October, 1992, nor is there any material to show as to how he examined the the necessity of exercising the power under Section 9[2]. Under the circumstances, in our view, it is a wrong exercise of power under Section 9[2] which has affected the detenu's right of making an effective representation under Article 22[5] of the Constitution of India and therefore, the continued detention of the detenu is bad and illegal and the impugned detention order is required to be quashed and set aside."

#. Considering the facts and circumstances of the case on hands with the settled legal position so also with observations of the this Court, according to my opinion, one contention is enough to vitiate the detention order only on the ground that the subjective satisfaction is not established from the face of the record and claim of the privilege under Section 9[2] of the PASA Act without examining and without verification of the such statements by the detaining authority, obviously the legal and fundamental rights of the detenu of making an effective representation as provided under Article 22[5] of the Constitution has clearly violated and also considering

the decision of this COurt given in special civil application no. 1039 of 2001 dated 10th July, 2001, the order of detention requires to be quashed and set aside.

#. In the result, the present petition is allowed. The detention order dated 25th August, 2000 actually effected on 3rd January, 2001 passed by the District Magistrate, Banaskantha is hereby quashed and set aside. The present petitioner - detenu Vishnubhai Kashiram Patel who has been detained at Surat Jail is ordered to be set at liberty if he is not required in any other case. Rule is made absolute with no order as to costs.

Date : 24-7-2001 [H.K.Rathod, J.]

Vyas